STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BENNETT,

Plaintiff-Appellant,

v

WINN DIXIE SUPERMARKETS, INC.,

Defendant-Appellee,

and

ANTHONY WHITE,

Defendant.[1]

UNPUBLISHED
February 4, 2003

No. 236685
Wayne Circuit Court
LC No. 00-037046-NI

Before: White, P.J. and K.F. Kelly and Gribbs*, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right an order granting summary disposition to defendant Winn Dixie Supermarkets, Inc.[2] We affirm.

I. Basic Facts and Procedural History

This case arose from a motor vehicle accident that occurred in Louisiana wherein a tractor-trailer operated by defendant White struck a tractor-trailer operated by plaintiff. Plaintiff, a Michigan resident, alleged that the tractor-trailer operated by defendant White (hereinafter "the vehicle") was owned by "defendant Winn Dixie Company." Plaintiff also alleged that

---

[1] The trial court dismissed defendant Anthony White finding that there was no personal jurisdiction and insufficient service of process. Plaintiff does not appeal this ruling.

[2] Because the issues on appeal only address summary disposition as to defendant Winn Dixie Supermarkets, Inc., and not defendant Anthony White, we refer to defendant Winn Dixie Supermarkets, Inc. as "defendant" and defendant Anthony White as "defendant White."

---

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

"defendant Winn Dixie Company, is a Florida Corporation Qualified and in good standing in the State of Michigan and conducts business in the State of Michigan." In its answer to plaintiff's complaint, defendant alleged that it was not the owner of the vehicle and was not White's employer.

Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of fact as to whether defendant was the owner of the vehicle or White's employer. As proof of this assertion, defendant presented the affidavit of R.P. McCook, defendant's vice president. In response, plaintiff presented his own affidavit stating that the vehicle had "Winn Dixie" painted on the side and defendant White wore a jacket with "Winn Dixie" written on it. Plaintiff also presented the police report identifying the owner as "Winn Dixie Co, P.O. Box 51059 New Orleans, LA 70151." The trial court denied defendant's motion for summary disposition, without prejudice, and requested further briefing on the issue. Defendant filed a motion for rehearing or reconsideration, pursuant to MCR 2.119(F), which the trial court denied.

Subsequently, defendant filed a renewed motion for summary judgment including additional documentation. In addition to McCook's affidavit, defendant presented documents from the Louisiana Secretary of State indicating that Winn Dixie Louisiana, Inc. owned the vehicle at the time of the accident and Winn Dixie Logistics, Inc. owned the vehicle at the time of the motion. Defendant asserted that, "These are entities legally distinct from Winn-Dixie Supermarkets, Inc."

In response, plaintiff presented several documents with various names including the words "Winn Dixie": (1) a Dun and Bradstreet report on defendant listing it as a corporation in the state of Florida with a resident agent in Michigan; (2) a check with the insignia "Winn Dixie" paid to Rockwell Transportation, Inc.[3]; and (3) four pages of a corporate report of "Winn Dixie Stores, Inc." that lists several subsidiaries including Winn Dixie Louisiana, Inc, but not defendant.[4] Plaintiff argued that this evidence demonstrated that defendant was an agent or servant of "Winn Dixie" and, therefore, the owner of the vehicle.

In response, defendant filed a reply brief arguing that plaintiff failed to establish a genuine issue of material fact with regard to defendant's ownership of the vehicle. Defendant pointed out that plaintiff mistook Winn Dixie Stores, Inc.'s trademark "Winn Dixie" as a corporate name. Defendant produced a document retrieved from the Florida Department of State, Division of Corporations indicating that "Winn Dixie" is a trademark of "Winn Dixie Stores, Inc., A Florida Corporation." Additionally, defendant argued that plaintiff failed to establish any connection between defendant and Winn Dixie Stores, Inc.

At the hearing, plaintiff argued:

---

[3] Plaintiff asserted, without any supporting evidence, that the check was paid to plaintiff's employer for "damages done to its property (their trailer)."

[4] The report also refers to "fifteen wholly inactive domestic subsidiaries," but does not list them by name. While defendant may indeed be one of the fifteen, plaintiff never established this below.

> Our position is that Winn-Dixie Supermarkets in Michigan is simply a wholly-owned subsidiary of the single corporation Winn-Dixie; that Winn-Dixie Louisiana likewise is simply a wholly-owned [sic] subsidiary of the parent corporation, which is identified as Winn-Dixie.
>
> In support of that, I have provided the Court with a copy of the annual report in which Winn-Dixie says that Winn-Dixie Michigan and Winn-Dixie Louisiana are wholly owned subsidiaries of the parent corporation and operate in that fashion.

However, defendant pointed out that the annual report did not indicate that "Winn-Dixie Michigan" is a wholly owned subsidiary of "Winn Dixie," nor did plaintiff present evidence of a connection between "Winn-Dixie Michigan" and defendant. Plaintiff, in turn, argued that McCook, defendant's vice president, also "signed" Winn Dixie Store, Inc's annual report.

The trial court granted defendant's renewed motion ruling, "The driver, Anthony White, was working for Winn-Dixie Louisiana and that's the corporation that should be sued and that's a separate corporation from Winn-Dixie Supermarkets. And so I'm accordingly going to grant the motion . . . ." Plaintiff filed a motion for rehearing or reconsideration that the trial court denied.[5]

II. Standard of Review

The grant or denial of a motion for summary disposition is reviewed de novo. *Haliw v City of Sterling Heights*, 464 Mich 297, 301-302; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id*. at 302. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*.

III. Jurisdiction

Plaintiff argues that defendant "submitted to the jurisdiction of the State of Michigan." However, defendant did not argue that it was not subject to Michigan jurisdiction, nor did the trial court dismiss defendant on the basis of jurisdiction. Therefore, this issue is not properly before us. *Auto Club Ins Ass'n v Lozanis,* 215 Mich App 415, 421; 546 NW2d 648 (1996).

IV. Defendant's Motion for Summary Disposition

Plaintiff next argues that the trial court erred in granting summary disposition to defendant. We disagree.

---

[5] To this motion, plaintiff attached the entire 2000 annual corporate report for Winn Dixie Stores, Inc. which included information that was not contained in the pages that plaintiff had previously presented to the trial court. Specifically, the additional pages contained the information that McCook was the vice president of Winn Dixie Stores, Inc.

In short, plaintiff argues that "Winn Dixie," is a single business enterprise and that both defendant and Winn Dixie Louisiana, Inc., the owner of the vehicle, are mere instrumentalities of "Winn Dixie." Plaintiff also argues that defendant exists merely as an alter ego of "Winn Dixie." Therefore, plaintiff argues, all three corporations are essentially the same entity making defendant the owner of the vehicle.[6]

The question on appeal is whether plaintiff presented sufficient evidence to create an issue of fact as to whether defendant owned the vehicle. Louisiana state records indicate that, at the time of the collision, the vehicle was owned by Winn Dixie Louisiana, Inc. At the time of defendant's motion in the trial court, the vehicle was owned by Winn Dixie Logistics, Inc. Plaintiff presented no direct evidence that defendant was the owner of the vehicle.

Instead, plaintiff presented what purports to be evidence that Winn Dixie Louisiana, Inc. and defendant are wholly owned subsidiaries of the same company. Specifically, plaintiff presented the annual report of Winn Dixie Stores, Inc., which lists several wholly owned subsidiaries, whose names include the words "Winn Dixie." However, the annual report does not list defendant as a wholly owned subsidiary of Winn Dixie Stores, Inc.

Plaintiff also argues that a "connection" between defendant and Winn Dixie Stores, Inc. may be inferred because the two companies share the same officer, R.P. McCook. Based on the annual report and the affidavit presented by defendant, it appears to be true that the two companies have a common vice president. However, plaintiff did not sue Winn Dixie Stores, Inc. and the fact remains that the annual report of Winn Dixie Stores, Inc. does not list defendant as a subsidiary. The fact that McCook is defendant's vice president as well as Winn Dixie Stores, Inc.'s vice president does not create an issue of fact as to whether defendant owned the vehicle in question.

Plaintiff also argues that the "Winn Dixie" insignias on defendant White's clothing and the vehicle create an issue of fact regarding defendant's ownership of the vehicle. Plaintiff refers to Winn Dixie Stores, Inc. as "Winn Dixie" which is the registered trademark of Winn Dixie Stores, Inc. However, because plaintiff has not sued Winn Dixie Stores, Inc. and has not shown a connection between and defendant and Winn Dixie Louisiana, Inc. this evidence does not advance his argument. We further observe that plaintiff's complaint asserts only that the vehicle

---

[6] In so arguing, plaintiff urges us to apply the "economic reality test" pursuant to *Wells v Firestone Tire & Rubber*, 421 Mich 641; 364 NW2d 670 (1984). *Wells*, a products liability case, involved the question of whether an employment relationship existed between the plaintiff and the defendant so that the claim was barred by the Worker's Disability Compensation Act. *Id.* at 646. Unlike this case, it was undisputed that the plaintiff was employed by a wholly owned subsidiary of defendant. *Id.* at 645. The Court noted that the economic reality test is used to determine whether employment exists for the purposes of workers' compensation law. *Id.* at 648. Because this case does not involve workers' compensation law and because defendant's status as a subsidiary of the vehicle's owner is disputed, *Wells* is inapposite. Similarly, plaintiff erroneously suggests that the theory of "piercing the corporate veil" applies to this case because defendant is a "mere instrumentality" of its parent corporation.

was "owned by Defendant Winn Dixie Company," and does not state a theory directed at holding defendant responsible based on its corporate association with Winn Dixie Louisiana, Inc.

Plaintiff finally argues that the trial court erred in granting summary disposition because a vehicle may have more than one owner. However, regardless of the possibility of multiple ownership of a vehicle, plaintiff has not presented any evidence to create a genuine issue of fact as to whether defendant owned the vehicle.

V. Sanctions

Defendant requests that this Court assess actual and punitive damages against plaintiff pursuant to MCR 7.216(C)(1)(a). We decline to award such damages.

MCR 7.216(C)(1)(a) provides as follows:

> (C) Vexatious Proceedings.
>
> (1) The Court of Appeals may, on its own initiative or the motion of any party, assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
>
> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal[.]

Although we do not find plaintiff's arguments to be persuasive, we do not find that there was no reasonable basis for plaintiff's belief that the issues were meritorious. Nor is there any indication that plaintiff filed the appeal merely for the purpose of hindrance or delay.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs